IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL N0.178 OF 2023

(Arising from the decision of Kibaha District Court in Matrimonial Civil Appeal No.9 of 2023 before Hon. J. Lymo, SRM)

HADIJA HEMEDI MCHAWINDUGU ..... APPELLANT

VERSUS

HAMISI RAMADHANI ..... RESPONDENT

JUDGMENT

19th March, 2024 & 16th April, 2024

MWANGA, J.

This is a second appeal. **HADIJA HEMEDI MCHAWINDUGU, t**he appellant above appealed against the decision of the District Court of Kibaha at Kibaha in Matrimonial Civil Appeal No. 09 of 2023, which has a root in Matrimonial Cause No. 25 of 2023 from Mkuza Primary Court. The trial court, *interalia,* granted a divorce and ordered the respondent to pay Tshs. 100,000/= per month as maintenance for the children. Moreover, a house at Msangani was built in 2020 to be equally

divided and a house at Msangani was built in 2014 and a plot at Magindu was awarded to the Respondent.

The appellant was aggrieved with the trial court decision and appealed to the district court and the appeal was upheld on the distribution of matrimonial properties and on the maintenance after the evaluation of evidence ordered it to be Tshs. 100,000/-.

Being aggrieved with the decision, the appellant appealed against the decision of the District Court to this court on three grounds as summarized hereunder: -

1. The first appellate court erred in law and fact for failure to adopt strong evidence adduced by the appellant in the trial court.
2. The first appellate court erred in law and fact for failure to consider properties acquired during cohabitation and subsistence of marriage hence failing to award the matrimonial properties.
3. The first appellate court erred in law and fact for failure to consider the best interest of the child.

With the above grounds of appeal, I have found it important to state brief facts of the case. The appellant and respondent were cohabiting together from the year 2012 until the year 2017 when they

were married. They were blessed with two issues namely Nasri Hamisi Ramadhani (8 years) and Rahim Hamis Ramadhan (4 years). Things got worse when there was a party for their children where during the dance the appellant was being pushed several times by the so-called husband's mistress. While asking the respondent why he invited the said woman, the respondent panicked and his mother told him to divorce the appellant, otherwise, she would divorce her. As a result, the appellant petitioned for divorce on grounds of infidelity. However, she was dissatisfied with the decisions of the trial and District Court on the distribution of assets and custody of the children. As I have pointed out, the district court maintained the decision of the Primary Court, hence this appeal.

During the hearing, the appellant was represented by Ms. Ritha Ntagazwa, a learned advocate, and the respondent was represented by Mr. Tumaini Mgonja, also a learned advocate.

In the first ground of appeal, the counsel for the appellant submitted that on page 5 of the proceedings, the appellant pointed out that in 2014 she contributed Tshs. 200,000/= in the acquisition of a plot in the Magindo area and 2021 they bought a plot in the Msangani area and built a house in 2022. She further submitted that in 2012 they lived

together with the respondent and that led to the acquisition of a farm and two houses in the Msangani area.

Per contra, the advocate for the respondent raised the following contentions. **One,** that no evidence was produced that the appellant contributed Tshs. 200,000/=. According to him, the record shows that the plot was bought in 2009 when the appellant was not married and the mason who is mentioned by the appellant (Abdallah Mtembekete-Respondent witness) stated at the trial court that he built the house in 2011 and that he handed over the house to the respondent in 2013. He was also the ten-cell leader of the area but he did not know the appellant, and he had never seen her while constructing the house. On top of that, Exhibits DK2-DK 12 are the agreement and receipts of buying materials bearing the name of the respondent. Also, there is no evidence that the appellant gave Tshs. 1,600,000/ to complete the house. She even did not put it in writing. See page 7 of the proceedings. Again, the said Tshs. 500,000/ was not evidence that it was for the house.

Two, the appellant had her own house where she was living. **Three,** the appellant also said when she was married the respondent had his house. **Fourth,** the appellant never cross-examined the said

mason (Abdallah) about her involvement in the acquisition of the property. According to the counsel, in law, failure to cross-examine is a fact that she agreed with what the mason said.

In rejoinder, the Advocate for the respondent submitted that the farm that the respondent produced in exhibit DK2 was the farm-bought Tsh. 500,000/= and if the appellant contributed 200,000/= it becomes the farm purchased by two of them.

I have thoughtfully considered the available evidence and submission of both counsels in this ground of appeal. As a matter of principle, the court has held that in a second appeal, the court has to be cautious to vary the findings made by the courts below. That was the position in the case of **Director of Public Prosecutions Vs Norbert Enock Mbunda**, Criminal Appeal No. 108 of 2004(CAT-Unreported) where on page 5 the court had this to say: -

> ***"Needless to repeat, this is a second appeal. In a second appeal, the court is always cautious to reverse findings of fact made by courts below unless they are, on the face of it, unreasonable or perverse". (Emphasis is mine).***

Indeed, the present appeal is second. The issue now is whether the decision of the district court is, on the face of it, unreasonable or perverse. When giving the decision, the district magistrate court had the following views:

> ***"In the present matter, I had enough time to consider the evidence adduced by the appellant at the trial court. Unfortunately, her evidence that they started living together in 2012 is doubtful because her only witness could not support her. Again, I did not see an iota of evidence supporting that the properties she mentioned were truly acquired together or even evidence to show that she was involved, in any way, in developing those properties. It is important to note that, what is supposed to be distributed in matrimonial cases like this one is matrimonial assets/properties acquired in joint efforts during subsistence of marriage, or properties which have been substantially improved jointly although they are personal properties – see the case of Anna Kanugha vs Andrea Kanungha [1996] TLR 195"***

The primary court decision considered the fact that the appellant did not contribute to the acquisition of the properties she was claiming. The plot at Msangani was acquired in 2009 and the developments were

done in 2011 as it was substantiated by SU2 and SU4. Furthermore, even the plot at Magandi was acquired in 2014 before their marriage and if the appellant wanted it to be taken as it was acquired during the presumption of marriage, it does not fit because they started their relationship in 2013 and the plot was acquired in 2014. It was very unfortunate appellant did not cross-examine the SU2 on the issue of the construction in 2011. It is settled law in the case of **Shomari Mohamed Mkwama versus the Republic,** Criminal appeal No. 606 of 2021 (CAT-Unreported) that;

> ***It is now a settled position of the law that failure to cross-examine the adverse party's witness on a particular aspect, the party who ought to cross-examine the witness, is deemed to have taken as true, the substance of the evidence that was not cross-examined;***

Given the above, I entirely agree with the respondent that the appellant's failure to cross-examine the facts alleged is equally taken that she agreed with the assertions. That being said and done this ground of appeal fails.

The second ground of appeal was about the properties acquired during cohabitation and the subsistence of marriage. Counsel for the

appellant submitted that the appellant contributed Tshs. 200,000/= for the acquisition of the farm. Also, the appellant showed that the house was bought together and produced the agreement showing the names of both parties. In the second house, the appellant conceded on the trial court that the plot was bought by the respondent in 2009. But from the construction to the completion of the house the appellant participated fully because she was doing business selling chicken. She further submitted that on page 7 of the proceedings, the appellant contributed Tshs. 1, 600,000/- to compete with the houses they were constructing. She also contributed Tshs. 500,000/- which was used to buy iron sheets in the Hagani area. The counsel cited section 144 (2) b of the Law of Marriage Act and the case of **Shakila Lucas Vs, Ramdahni Sadick**, Civil Appeal No. 349 of 2020 (CAT-Unreported), and that the matrimonial properties may be acquired before marriage but improved by the other party due to the marriage on their joint efforts.

In his reply, counsel for the respondent submitted that when the respondent bought the farm in 2013 the appellant was not yet married. However, the plot bought in 2021 where the small house was built is not disputed and it was correctly distributed half. According to him, the agreement contains the names of both parties and the respondent

agreed that they acquired it jointly. It was added that the appellant never cross-examined the said mason-Abdallah about her involvement in the acquisition of the property in 2009. He further submitted that there is no evidence that the appellant has been living with the respondent since 2012. Even, SM2 did not testify as such. On page 11 on cross-examination, SM2 said that the respondent had another woman they were lying together before the appellant. SU3 told the trial court that she knows the respondent and that they lived together from 2011 until 2014, and in 2012 they were blessed with children with the respondent through DK13.

Having considered the submission of the parties and the evidence available, it is the trite law under Section 114-(1) of the Law of Marriage Act, Cap. 29 [R.E 2022], courts when ordering divorce or separation should also issue appropriate orders dividing between the parties the assets that parties acquired during the marriage by their joint efforts. see also the case of **Shakila Lucas Vs, Ramdahni Sadick**(Supra).

Given the above provision of the law and under the circumstances, I find nothing to lead or to convince me to depart from the concurrent findings of the courts below regarding the extent of contribution by the appellant and the respondent in the acquisition and improvement of

their matrimonial asset in issue. Since the trial court and first appellate court's finding on the issue were guided by the law governing the distribution of matrimonial assets, I hold that there were no properties that were acquired during the cohabiting of the parties. This can be seen in the trial court judgment, I quote;

> ***"SM1 katika shauri hili hajaweza kuonesha Ushahidi wa mchango wake , ameieleza mahakama kutoa hela ya kulipa kodi umeme tanesco na ujenzi lakini hakuna Ushahidi wowote kwani majina yote ni ya Mdaiwa katika vielelezo na nyaraka za tanesco, kodi na mdaiwa Kwenda mbali zaidi kuleta risiti za vifaa alivyokuwa ananunua vifaa vya ujenzi miaka hiyo kabla ya ndoa. SM1 katika shauri hili ameshindwa kuonesha mahakama Ushahidi wa mchango wake katika kupatikana kwa mali hiyo baada ya ndoa yao hivyo jambo lisilopingika katika shauri hili kuwa nyumba ya msangani ilijengwa kabla ya wanandoa hawa hawajaoana.hivyo basi mali iliyopatikana kwa wanandoa haw ani kiwanja cha msangani chenye chumba kimoja ambacho kilipatikana mwaka 2020 na hakina ubishani kwa pande zote mbili hivyo mahakama hii inagawa asilimia 50 kwa mdai na asilimia 50 kwa mdaiwa."***

Given the above, I hasten to state that there was no evidence to the extent of the contribution of the appellant in the accusation or improvements of the properties since her cohabiting situation does not fit since she cohabited with the Respondent in the year 2013 and the acquisition of the property was in 2009 and improved in 2011 as stated by SU2 and the other plot was acquired in 2014 in which still did not fit in cohabitation since it did not reach years of presumption of marriage as provided in Section 160 of the Law of Marriage Act. Therefore, this ground of appeal also fails.

In the third ground of appeal, the appellant's counsel submitted that the parties were blessed with two issues. Both children are schooling, and the first appellate court did not consider their school expenses, ie, accommodation and school fees. She cited Section 26(1) (a) of the Law of the Child Act, Cap. 13 R.E 2019, and Section 129 of the Law of the Marriage Act. She prayed the appeal to be allowed.

Per contra, counsel for the respondent submitted that the responsibility of maintenance is not for one parent alone. But such responsibility should be carried to the extent of the capacity of the person carrying it. The respondent told the court that he is a driver, hence he asked the court to give Tshs, 60,000/= but the trial court

ordered the respondent to pay Tshs. 100,000/=, the amount which the first appellate court maintained. On page 11, the court ought to have considered the respondent's income. He submitted in the alternative looking at social justice the same house which was built in 2021 may be given to the appellant one hundred percent and the respondent constructs an extension room as an addition plus a toilet to accommodate the children and the appellant. He prayed the appeal be dismissed with costs.

Before dwelling into this ground of appeal, I wish to highlight the law for granting custody to the child, section 4(2) of the Law of the Child Act, Cap 13 R.E 2019 provides for general regard that;

> ***"The best interests of the child shall be a primary consideration in all actions concerning children whether undertaken by public or private social welfare institutions, courts or administrative bodies".***

Because of the above, it is the view of the court that for the court to consider custody it is mandatory to consider the best interest of the child. See also the case of **Glory Thobias Salema v. Philemon Mbaga,** Civil Appeal No 46 of 2019 [2020] TZHC 3794 (13 November 2020).

From the case at hand, there were no disputes in the custody of the issues as it is seen the appellant wanted to be given custody and the respondent did not dispute that. In the first appellate court after evaluation of the evidence came up with the decision that the respondent to provide Tshs. 100,000/= per month since the respondent is the mere driver. This court also is aware of Section 129 of the Law of Marriage Act that the court has to consider the income of the respondent before making orders. Let it be remembered that it is the appellant who wanted the custody of the children and it was not disputed by the respondent and the respondent offered the Tshs. 60000/= as the maintenance. However, the court evaluated the evidence and in consideration of the Respondent's income came up with Tshs. 100,000/= as the maintenance fee which this court considers to be reasonable. To this end, therefore, this ground of appeal also lacks merits.

In light of the above discussions, I am of the profound view that the appeal lacks merit. Therefore, it is hereby dismissed and the decision of the district court is upheld. Being a matrimonial cause, each party should bear its costs.

Order accordingly.

H. R. MWANGA

JUDGE

16/04/2024